

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 95-01190

AUG 04 1998

COUNSEL: [REDACTED]

HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

Her separation from active duty in the Illinois Air National Guard be determined invalid.

She be given an opportunity for an administrative review board hearing on the record after an opportunity to be heard; or, in the alternative, she be restored to her Active Guard/Reserve (AGR) status, with back pay and allowances and with credit for the time in grade for all purposes to include pay, promotion and retirement from the date of discharge to the date of reinstatement.

The NGB Form 26, Department of the Army and the Air Force, National Guard Bureau, ANG Active Duty Performance Rating, rendered for the period 1 February 1990 to 31 January 1991, be expunged from her record.

She be awarded proficiency pay for the period October 1990 through 31 March 1992.

APPLICANT CONTENDS THAT:

Through counsel, applicant contends her separation from Full-Time National Guard duty was unjust.

Except for four weeks of schooling in January [1990], no further on-the-job training (OJT) or even initial counseling was given until January 1991 when it appeared that she was not successful as a recruiter.

She felt very uncomfortable with her supervisor, who would glare at her (applicant's) chest and when the glaring became obvious she would tell her (applicant) her ribbons were not aligned properly. Additionally, her supervisor held "closed door" discussions with her about her married life and her happiness with her husband. Finally, on 7 August 1990, her supervisor made remarks and touched her in such a way so that she perceived the incident as an inappropriate "advance." She rebuked her supervisor's advance and fled the room.

Her supervisor proceeded to harass her and counsel her continuously saying that everyone is not meant to be a recruiter. After the incident and because of the constant harassment, her production level decreased.

The "No Discrimination" finding in response to her military discrimination complaint was arbitrary. The environment became abusive when she rebuked her supervisor's advances. Until the incident, she was meeting production goals, with minimal help of fellow recruiters. Finally, her production fell off because of her supervisor's unprofessional conduct and the hostile atmosphere within the office. The investigator did not base his decision on the evidence in the record. His failure to do so caused her eventual unwarranted discharge.

She was given a derogatory annual performance rating for her inability to meet the assigned monthly goal. Her failure to meet her goals was a result, not of her inability, but of the constant harassment by her supervisor. Her not being a "team player" resulted from the fact that she did not want to "play the game." Her supervisor wanted her to, and as a result the working conditions became abusive. The report is administratively incorrect and in violation of ANGR 39-62.

She was told she was being discharged by reason of substandard performance and that her separation was involuntary. However, her report of separation indicates that her separation was due to the expiration of her current tour. Proper procedures in the separation process were not followed. As a result, she was denied a fair and impartial review of the circumstances surrounding the separation. The State Adjutant General relied solely on the provisions of ANGR 35-03 to separate her from the Active Guard/Reserve (AGR) program. Sole reliance on this regulation is inappropriate, as ANGR 39-10 is the controlling regulation for involuntary separation based on unsatisfactory performance. It is readily apparent the State did not adhere to the policy and procedures established therein. This failure to follow regulations is a direct violation of her rights and makes her separation invalid.

The unwarranted denial of proficiency pay violated AFR 39-45. She was assigned as a recruiter with the special duty identifier of 99500. She met the requirements for eligibility and yet was unduly denied pay because of her supervisor's hostile treatment of her.

In support of applicant's request, counsel submitted a 12-page supplemental statement, with attachments. (Exhibit A)

STATEMENT OF FACTS:

Prior to the events under review, applicant had four years of prior active enlisted service in the Regular Air Force (29 January 1980

to 28 January 1984) and prior service in the Alabama Air National Guard.

On 27 July 1989, she enlisted in the Illinois Air National Guard (ILANG) and as a Reserve of the Air Force for a period of six years, with the duty title of unit personnelist.

She was ordered to active duty under the provisions of 32 USC 502(f) and ANGR 35-03 by orders dated 24 August 1989. By orders dated 28 November 1989, she was ordered to active duty under 32 USC 502(f) and ANGR 35-03, for the period 5 December 1989 through 4 December 1994.

Effective 5 December 1989, she was assigned Duty Air Force Specialty Code (DAFSC)-99500, with the duty title of "Recruiter."

An ANG Active Duty Performance Rating (NGB Form 26) was rendered for the period 1 February 1990 to 31 January 1991, with an overall evaluation rating of "Unsatisfactory."

Evidence provided by the applicant indicates that, on 25 February 1991, the wing commander notified her she was being placed on probation in accordance with ANGR 33-03, chapter 4, until 30 April 1991, for failure to meet her recruiting goals. Applicant acknowledged receipt of the letter on 27 February 1991.

On 3 March 1991, applicant filed an Equal Opportunity Treatment (EOT) complaint of sexual harassment against her supervisor. On 9 April 1991, the Social Actions Officer's Report of Inquiry recommended a full investigation regarding this complaint be conducted and that applicant be put in a temporary position and removed from the recruiting office immediately until the complaint was resolved.

In the 20 July 1991 Report of Investigation, provided with applicant's application, the Investigating Officer concluded there was no evidence to support the allegation of sexual harassment; the further allegation of religious discrimination stemmed from a one-time incident that was stopped when it was brought to the attention of applicant's supervisor that Christian music offended the applicant; that applicant misperceived her supervisor's actions; and that applicant's perception of her supervisor's intentions may have been fed by widespread but unsubstantiated rumors about the supervisor's homosexuality. The Investigating Officer recommended that due to the damage the complaint caused to the working relationship between applicant and her supervisor, the applicant be removed from the Recruiting Office and offered the next AGR position on base for which she was qualified. On 25 July 1991, the results of the formal investigation were provided to the applicant for review. On 4 August 1991, after meeting with her commander and discussing the conclusions and recommendations contained in the Report of Investigation, applicant stated that she did not accept the findings as a resolution of her complaint. The case was forwarded through appropriate channels to The Adjutant

General of Illinois who adopted the investigator's recommended findings that there was no evidence to support the allegation of sexual harassment or religious discrimination. On 20 December 1991, the National Guard Bureau, after reviewing the applicable documents and finding no deficiencies in compliance with law and regulation, administratively closed the case.

On 15 April 1991, applicant was detailed to administrative duties in the Personnel Office. She was returned to recruiting duties on 25 October 1991. On 25 October 1991, the wing commander notified applicant that she was being given another 60-day probationary period since she had completed only 45 days of the 60 days established by her initial probationary letter dated 25 February 1991. Applicant was further advised that should she fail to meet her recruiting goals of five enlistments for November and December 1991, she would be issued a 30-day termination letter on 1 January 1992 ending her Recruiting AGR tour effective 30 January 1992.

On 22 November 1991, the Inspector General advised applicant there were few positions within the Illinois ANG which could accommodate her as a recruiter and that assignment as other than a recruiter would stop her entitlement to proficiency pay. Therefore, the decision was made to return her to the position she held prior to the investigation of her EOT complaint, but to have her report to another supervisor at a different level.

On 3 January 1992, the Director of Personnel notified applicant that because of her inability to meet her recruiting goals, he was recommending her recruiting tour be terminated for substandard duty performance under the provisions of ANGR 35-03, para 6-5c(4). On the same date, applicant acknowledged receipt of the memorandum and her understanding that she had five (5) days to respond. Applicant responded to the notification on 9 January 1992 through her attorney.

On 29 January 1992, the Director of Personnel recommended to the Wing Deputy Chief of Staff that applicant's recruiting tour be terminated for substandard duty performance in accordance with ANGR 35-03, para 6-5c(4). The Wing Deputy Commander for Support and the Wing Commander concurred with the recommendation.

On 20 March 1992, The Adjutant General notified applicant that after a thorough review of the investigating officer's report and applicant's rebuttal to her commander's recommendation for involuntary separation from Full-Time National Guard Duty for substandard performance, he approved the involuntary separation action under the provisions of ANGR 35-03, paragraph 6-5, effective 31 March 1992.

On 31 March 1992, applicant was honorably released from active duty under the provisions of ANGR 35-03 by reason of completion of AGR military duty tour and transferred to the Air National Guard, State of Illinois. She was credited with 2 years, 6 months, and 26 days of active service during this period.

Information derived from applicant's master military pay account reflects she was paid Special Duty Assignment (SDA) pay as follows (Exhibit L):

1 Feb 90 - 30 Apr 90	\$165 per month
1 May 90 - 31 Dec 90	\$220 per month
1 Jan 91 - 31 Dec 91	\$220 per month
1 Jan 92 - 31 May 92	<u>\$220 per month</u>

TOTAL PAID \$5,555 .00

Effective 9 August ,1994, applicant was promoted to the grade of master sergeant in the ILANG and **as** a member of the Reserve of the Air Force. She is currently serving as a logistics plans manager.

AIR FORCE EVALUATION:

The Chief, Personnel Utilization, ANGRC/MPPUR, recommended denial of the requested relief, stating the actions of applicant's supervisors and commanders were consistent with the applicable regulation covering ANG recruiters. Applicant's EOT complaint was thoroughly investigated and the findings and conclusions were supported by the evidence of record and the complaint was properly dismissed by the National Guard Bureau Central Personnel Center.

MPPUR further stated that ANG recruiters who do not meet production goals are returned to their previous military assignments. Applicant was properly terminated from her recruiter tour and reassigned to her previous career field as a traditional Guardsman.

MPPUR provided a letter from the ILANG with expanded comments pertaining to events surrounding applicant's termination from her AGR recruiter position.

The complete evaluation, with attachments, is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Counsel took exception to several issues contained in the letter from the ILANG (attached to Exhibit C). She stated applicant was treated differently when she refused the sexual advances of her female superior. In applicant's original appeal it is well documented that she was not treated similar to other recruiters after an incident that occurred between applicant and the supervisor. The letter from the ILANG suggests that applicant has failed to show that she was subjected to sexual advances because there were no witnesses so the allegations of harassment cannot be substantiated. While there may be no direct evidence of

harassment, the circumstantial evidence and the credibility of the applicant provide sufficient evidence.

Counsel further stated that applicant was not able to meet the standards placed on her because of the conduct of her supervisor which was sufficiently severe or pervasive to alter the conditions of the employment and create an abusive working environment.

While it is true that individuals who cannot meet recruiting goals should be removed from their position, this should only happen after the recruiter is given proper training and a fair chance of obtaining their goal. Applicant was not given that opportunity. She was constantly harassed by a supervisor that thwarted her recruiting efforts rather than promoted them.

The harassment continued and the supervisor even used the denial of proficiency pay as a punishment. Applicant was not the only recruiter not to meet her goal, yet she was the only one to have proficiency pay withheld.

Applicant deserved an opportunity to show that she could recruit, unrestrained by the influence of her supervisor. This opportunity was denied her, the prejudice she suffered was only compounded because she was taken out of the recruiting job with no opportunity for a hearing. Applicant's separation was clearly in error, otherwise there would have been consistency with what was written on her DD Form 214 and what the notification of separation stated.

Counsel's response, with attachments, is at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION:

The Administrative Law Team, NGB-JA, provided comments addressing the issues of this case. JA stated that the Board cannot grant all the relief requested by applicant, even should it be found warranted. The board may correct applicant's performance appraisal, and may change her pay records to require special duty assignment pay. However, it may not reinstate her in a full time AGR slot. The Adjutant General (TAG) manages recruiting programs within each respective state. The TAG is the final authority for determining whether individuals in the AGR program will be separated (ANGR 35-03, para 6-1d).

JA noted applicant's contentions that the reasons given for her separation are inconsistent and, if the separation was for substandard performance, the state should have followed the procedures of ANGR 39-10. This regulation required the recommendation of a board of officers prior to separating members with more than six years of service in the Guard. JA stated applicant's reliance on ANGR 39-10 is misplaced. ANGR 35-03 covers the separation of full-time AGR personnel. ANGR 39-10 concerned the administrative separation of enlisted personnel from the Air

National Guard. Applicant has not been discharged from the Guard; she was released from a full time AGR tour and returned to her normal Guard status. The state followed the procedures set forth by regulation. Since the state did not commit any error, applicant's request for relief on this ground should be denied.

Applicant's contention that she was denied due process' since the investigation was insufficient to protect her rights, and the state did not make an effort to counsel or rehabilitate her is not supported by the record. Although not required by the regulation, an IO was appointed to ensure that the recommendation to terminate applicant was proper and in accord with the regulations. The IO concluded that it was. Applicant received counseling and retraining. Both were ineffective. During the 11 months she was a recruiter, she was counseled numerous times. In addition, her supervisors gave, or offered, her additional training. She was given the chance to make her production goals under a different supervisor, but still failed to meet them. Applicant failed to show any injustice or material error in the procedures used to separate her.

Applicant argues she should not have been removed without a review by a board after the third year of her tour to determine whether her tour should be extended. Applicant was separated due to substandard performance, IAW ANGR 35-03 and ANGR 33-02, para 4-3b (ANG Recruiting Management and Programs). ANGR 33-02 states that unsatisfactory performance, not corrected through normal documented counseling with ample opportunity for correction, can result in probation. Applicant was counseled on her failure to meet her goals, and was given additional training, none of which corrected her substandard performance. She was placed on probation twice, and failed to meet her goals. ANGR 33-02 states that failure to improve during probation will result in termination. Applicant was separated IAW the applicable regulations, and was not entitled to an AGR review board.

Applicant has not shown that the IO's finding of no discrimination was arbitrary or unsupported by the evidence. The gravamen of applicant's complaint is that, after she spurned her supervisor's sexual advances, her supervisor continually counseled and reprimanded her, with the intent of terminating her. The record does not support this theory, and many of the "facts" asserted by applicant to support her allegations are erroneous, inconsistent, or open to other interpretations.

Applicant's allegations are based on an alleged incident in the women's locker room. Applicant claims that her supervisor put her hand on her (applicant's) shoulder and offered to help her become a successful recruiter. Applicant interpreted this as a request for sexual favors. The supervisor denies the locker room incident took place as applicant described it. There were no witnesses to the locker room incident. Consequently, it is not clear which version is the right one.

Testimony shows that the supervisor's practice of staring at applicant's chest was probably related to the placement and alignment of applicant's ribbons. The supervisor has, on other occasions, noticed uniform deficiencies on the chaplain (male) and other members. The supervisor was, by all accounts, zealous on the proper wearing of the uniform. Applicant, according to some recruiters, needed scrutiny in this area.

The file shows extensive counseling and training by the supervisor in an effort to improve applicant's performance, including sending her to seminars, giving her training videos, and taking her along on interviews to observe proper techniques. These actions do not support the claim that she attempted to prevent applicant from achieving her production goals. In addition, applicant failed to meet her goals under the direction of a different supervisor. He (the other supervisor) testified that he offered her help and additional training, which she declined. Consequently, the IO's finding of no discrimination is supported by the evidence.

The IO found that applicant was sincere in filing her complaint, but that she had misperceived her supervisor's actions. He found that this misperception was fed by widespread but unsubstantiated rumors about the supervisor's sexual preferences. Applicant has not shown that a reasonable person would have perceived the sentence "I can really help you get ahead in this job" as sexual harassment, or even that applicant perceived it as such. The sentence does not make any specific reference to sex, or sexual favors. In addition, it was spoken by a supervisor to a subordinate who had failed to make her production goals for the preceding two months. A reasonable person would assume that the supervisor of an office that consistently met its production goals was offering to help make one of its weaker members a good recruiter. Applicant's testimony effectively shows that she leapt to the conclusion that her supervisor made a request for sexual favors, and then used the supervisor's reluctance to bring up the issue again as confirmation of her suspicions. That does not meet a reasonable person standard. In addition, her contention that she then began to be counseled all the time is not supported by the record. Applicant claims her supervisor began to threaten her with termination in September, a month after the alleged incident. However, the first counseling statement in the record is dated 10 October 1990, a month after applicant failed to enlist any recruits for September and fully two months after the alleged incident.

Applicant's contention that she believed she was being harassed is also made less believable by the fact that she didn't file her complaint until just prior to her referral appraisal and the letter placing her on probation. She claims she filed at that time because she had just found out about sexual discrimination from her EEO duties. Her argument is not supported by the record. Both the supervisor and the Deputy Commander for Support testified that they asked applicant the definition of sexual harassment, and what she would do about it, during her interview a year earlier. She

successfully defined harassment and indicated she would take the problem up the chain of command. However, the Deputy Commander for Support stated that applicant never told him her low production was due to a problem with her supervisor. She denied having any problems and stated that she was trying but just could not do the job.

The record does not support applicant's argument that after the locker room incident, and because of the resulting harassment, her production level decreased. The file shows she met her recruiting goal in August. Moreover, her low production did **not** begin in September. Contrary to her assertions, she did not meet her goals in June or July, prior to the alleged incident. Additionally, she failed to meet her goals when she was under another supervisor.

Finally, applicant contends she was still under the same supervisor when she returned to the recruiting office in October 1991 and that she was still not given the proper training. Both allegations are unsupported. She returned to the recruiting office under the supervision of 1Lt S---, who offered her any additional training she might want. She declined his offer, indicating that she did not need any additional training.

JA stated applicant has not shown that the poor working relationship between her and her supervisor is evidence of sexual harassment. It appears related to applicant's inability to do her job, her supervisor's admittedly tough management style, and applicant's practice of criticizing her supervisor in front of members in other offices.

Applicant requests that her appraisal be expunged because of the incorrect use of the rating chain. She does not claim the rating in her performance is inaccurate. The approving official on the report contends that it is accurate.

Regarding Special Duty Assignment Pay (SDAP), although applicant did not make her production goals, the record shows that other members of the recruiting office frequently did not make their production goals. The State failed to include any rebuttal evidence to show that other recruiters were also docked their SDAP. Since applicant's allegation that the non-continuation of SDAP was due to retaliation has not been rebutted, she should receive relief on this ground.

The complete evaluation is at Exhibit F.

The Chief, Personnel Utilization, ANG/MPPU, amended their previous recommendation (at Exhibit C) and recommended that applicant be paid Special Duty Assignment Pay (SDAP) for the period Oct 90 - 31 Mar 92, citing the same basis cited in the NGB-JA evaluation.

The complete additional ANGRC/MPPUR evaluation is at Exhibit I.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

Applicant disagreed with the NGB-JA evaluation and provided additional comments regarding her training/production, counseling, the contested appraisal report, and harassment.

In her conclusion, she stated the actions taken by her supervisors and commanders violated applicable regulations covering Air National Guard recruiters. Although she agrees that individuals who can't meet goal should be removed from their recruiting position, she thinks this should only happen after the individual has been given proper training and a fair chance of obtaining the goal. This was not the situation in her case. This case has focused too much on her production level instead of the real issue - that being her supervisor's constant harassment of her. The Air National Guard failed to address and explain the issue of why she received a lesser amount of pro pay which she was entitled to. Pro pay is not to be used as a disciplinary tool. Although she was not the only recruiter who failed to meet goal, she was the only recruiter to have the appropriate amount of pro pay withheld by her supervisor. This is evidence of her supervisor's harassment. Her supervisor did not treat everyone fairly, or the same.

Applicant's response, with attachments, is at Exhibit H.

In response to the ANG/MPPU revised evaluation, applicant stated ANG/MPPU concedes to the fact that her noncontinuation of SDAP was due to retaliation by her supervisor. She asks the Board to remember that, (1) this retaliation took place less than 60 days following the date of the locker room incident, and (2) she was the only recruiter to have pro pay withheld despite the fact that other recruiters had the same recruiting numbers for September 1990.

She further stated that her appraisal was in obvious retaliation for her filing her EEO complaint, which is further evidenced by the fact that it contains only negative commentary. The report should be expunged because it did not comply with the established time frame (5 Dec 89 - 4 Dec 90), its tone was defamatory, and it was not properly approved.

Applicant's response is at Exhibit K.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Sufficient relevant evidence has been presented to demonstrate the existence of probable injustice with regard to the applicant's

release from her AGR tour. After careful consideration of the evidence provided, we did not find that applicant's involuntary release from her active duty tour for substandard performance was contrary to the governing regulation, ANGR 35-03, or that she was denied rights to which she was entitled. In addition, based on the evidence available for our review, we cannot verify applicant's allegations of sexual harassment. Regardless, we do believe that she was treated differently than other recruiters who were not meeting their monthly recruiting production goals. This is evidenced by what, in our opinion, appears to have been excessive counseling sessions, undue supervision documenting the applicant's minute-by-minute actions, and periods of probation. In view of this, we believe that the applicant has been the victim of an injustice warranting some form of relief. This Board's recommending authority is limited with respect to State actions. Therefore, favorable consideration of applicant's requests to invalidate her separation from active duty and reinstate her to a full-time National Guard program is not possible. Nevertheless, in view of our findings, we believe her Federal records should be corrected to show she was continued on active duty until her established release date of 4 December 1994, with entitlement to Special Duty Assignment (SDA) pay. We are not inclined to recommend continuation beyond this date, since there is no statutory authority which guarantees continued service for members in the applicant's former position upon completion of a special tour of active duty. We believe the applicant will be afforded fitting relief by the corrections to the record we propose, with respect to those actions which are properly the subject of our review.

4. Contrary to applicant's contentions that she was denied SDA pay during the period October 1990 through 31 March 1992, information extracted from her master military pay records reflects that she did, in fact, receive SDA pay during the period in question. In view of the foregoing, and absent evidence to the contrary, applicant's request for SDA pay for the period in question is not favorably considered.

5. Based on a careful review of the available evidence, we find insufficient evidence has been presented to support a finding that the ANG Active Duty Performance Rating, rendered for the period 1 February 1990 to 31 January 1991, is an inaccurate assessment of the applicant's duty performance during the contested rating period or that the report was prepared contrary to the governing regulation. Accordingly, applicant's request that the contested report be expunged from her records is not favorably considered.

6. The applicant's case is adequately documented and it has not been shown that a personal appearance with or without counsel will materially add to our understanding of the issues involved pertaining to applicant's remaining requests. Therefore, the request for a hearing is not favorably considered.

THE BOARD RECOMMENDS THAT:

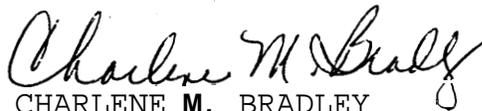
The pertinent military records of the Department of the Air Force relating to APPLICANT, be corrected to show that she was not released from active duty on 31 March 1992, but was continued in an active duty status, with entitlement to Special Duty Assignment pay, until 4 December 1994, at which time, she was honorably released from active duty by reason of completion of her Air Guard Reserve (AGR) military duty tour, and was transferred to the Illinois Air National Guard:

The following members of the Board considered this application in Executive Session on 9 December 1997 and 24 June 1998, under the provisions of AFI 36-2603:

- Ms. Charlene M. Bradley, Panel Chair
- Ms. Ann L. Heidig, Member
- Mr. Edward H. Parker, Member

All members voted to correct the records, as recommended. The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 30 Mar 95, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, ANG/MPPUR, dated 8 Apr 96, w/atchs.
- Exhibit D. Letter, SAF/MIBR, dated 22 Apr 96; AFBCMR Ltr, dated 10 May 96.
- Exhibit E. Letter from-Counsel, dated 10 Jun 96, w/atchs.
- Exhibit F. Letter, NGB-JA, dated 12 Aug 96.
- Exhibit G. Letter, AFBCMR, dated 19 Dec 96.
- Exhibit H. Letter from Applicant, dated 15 Jan 97, w/atchs.
- Exhibit I. Letter, ANG/MPPU, dated 28 Jan 97.
- Exhibit J. Letter, AFBCMR, dated 14 May 97.
- Exhibit K. Letter from Applicant, dated 3 Jun 97.
- Exhibit L. Datafax fr DFAS-DE/FYCC, dated 18 May 98, w/atchs.


CHARLENE M. BRADLEY
Panel Chair